

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

YOLANDA ZAVALA,) C 07-2307 MJJ (PR)
Petitioner,) **ORDER OF DISMISSAL**
vs.)
SCHEILA A. CLARK,) (Docket Nos. 9 & 15)
Respondent.)
_____)

Petitioner, a federal prisoner incarcerated in Dublin, California, filed this pro se habeas corpus petition pursuant to 28 U.S.C. § 2241 challenging the execution of her federal sentence. The Court ordered respondent to show cause why the petition should not be granted based on petitioner's cognizable claim. Respondent filed an answer, and petitioner filed a traverse.

BACKGROUND

In 2006, petitioner pled guilty in the United States District Court for the Eastern District of California to seven counts of mail fraud. On August 21, 2006, she was sentenced to 18 months in federal prison, and her projected release date is December 20, 2007. Pursuant to Bureau of Prisons ("BOP") regulations, codified at 28 C.F.R. §§ 570.20 and 570.21 and prohibiting her transfer to a Residential Reentry Center ("RRC") until ten percent

1 of her sentence remains, BOP officials have designated her for placement at an RRC on
 2 November 14, 2007.

3 **DISCUSSION**

4 Petitioner challenges the lawfulness of 28 C.F.R. §§ 570.20 and 570.21, which
 5 prohibit her placement in an RRC sooner, on the grounds that they are inconsistent with the
 6 clear congressional intent articulated in 18 U.S.C. § 3621(b). Respondent argues, *inter alia*,
 7 that petitioner has not exhausted her claim through the BOP's administrative appeals process.

8 Section 2241 does not specifically require petitioners to exhaust available remedies
 9 before filing petitions for a writ of habeas corpus. Castro-Cortez v. INS, 239 F3d 1037, 1047
 10 (9th Cir. 2001). Nonetheless, the Ninth Circuit requires "as a prudential matter, that habeas
 11 petitioners exhaust available judicial and administrative remedies before seeking relief under
 12 § 2241." Id. (citations omitted).¹ The requirement may be waived in limited circumstances
 13 because it is not a jurisdictional prerequisite. Id.; see, e.g., Laing v. Ashcroft, 370 F.3d 994,
 14 1000-01 (9th Cir. 2004) (listing circumstances when waiver of exhaustion requirement may
 15 be appropriate).

16 On May 21, 2007, petitioner pursued a BOP "Administrative Remedy" regarding the
 17 present claim, which Remedy was denied on May 30, 2007. She had 20 days to appeal the
 18 denial of that Remedy to the next level, but she did not do so until July 24, 2007. Her appeal
 19 was thus denied as untimely. She did not file an administrative appeal to the third and final
 20 level of review to the General Counsel's Office of the BOP.² Thus, as petitioner concedes,
 21 "she has failed fully to exhaust her administrative remedies." (Traverse at 3.)

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23 ¹As exhaustion is required under this authority, the Court need not address
 24 respondent's argument that exhaustion is also required under the Prison Litigation Reform
 25 Act because this petition challenges petitioner's "prison conditions." See 42 U.S.C. §
 1197e(a) (requiring exhaustion of any action under federal law challenging prison
 conditions).

26 ²A federal prisoner may seek formal review of an issue that relates to any aspect of his
 27 imprisonment under 28 C.F.R. § 542.10. The procedure requires that the prisoner first
 28 address his complaint to the institution staff. See 28 C.F.R. § 542.14(c)(4) (1997), Form BP-
 9. If dissatisfied with the response at that level, the inmate may appeal his complaint to the
 regional Director of the Bureau of Prisons ("BOP"). See id. § 542.15(a), Form BP-10.
 Finally, the prisoner may appeal his case to the General Counsel in the Central Office of the
 BOP, which is the "final administrative appeal." See id., Form BP-11.

1 Petitioner claims that the exhaustion requirement should be waived in her case. She
 2 argues that exhausting her claim through the BOP's administrative appeals process "would be
 3 futile here because the BOP's denial of petitioner's administrative remedies would be based
 4 on the regulation she challenges." (Traverse at 3.) Second, she argues she "could lose the
 5 benefit of consideration for early release" because the process would take too long.

6 Petitioner's speculation that pursuit of administrative remedies would be futile is
 7 belied by the fact that all four federal circuits that have addressed the validity of the BOP
 8 policy at issue here, 28 C.F.R. §§ 570.20 and 570.21, have found it invalid. See Wedelstedt
 9 v. Wiley, 477 F.3d 1160 (10th Cir. 2007); Levine v. Apker, 455 F.3d 71 (2d Cir. 2006); Fults
 10 v. Sanders, 442 F.3d 1088 (8th Cir. 2006); Woodall v. Fed. Bureau of Prisons, 432 F.3d 235
 11 (3d Cir. 2005). The federal district courts in the Ninth Circuit that have addressed the issue
 12 thus far have also found the BOP regulations invalid. See Whistler v. Wrigley, No. C 06-
 13 0860-LJO-WMW, 2007 WL 1655787, at *3 (E.D. Cal. June 7, 2007). Perhaps as a
 14 consequence of this across-the-board rejection of the BOP policy, in Whistler, the BOP
 15 informed the court that it had evaluated the petitioner "without reference to the time
 16 constraints imposed by 28 C.F.R. 570.20-21," and transferred him to a RRC, leading the
 17 court to dismiss the petition as moot. Id. at *6. Consequently, it is far from clear that
 18 petitioner's pursuit of administrative remedies would be futile; to the contrary, there is a real
 19 possibility that BOP officials will provide the remedy petitioner seeks in the first instance.
 20 In addition, waiver of the exhaustion requirement is not justified simply based on petitioner's
 21 fear that exhaustion will take too long. Indeed, it appears petitioner need only pursue one
 22 additional administrative remedy, to the highest level of appeal at the BOP's General
 23 Counsel's Office. Waiver of the exhaustion requirement is not warranted under these
 24 circumstances.³

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28 ³As the claims are not exhausted, the Court need not address respondent's alternative arguments.

CONCLUSION

In light of the foregoing, the petition for a writ of habeas corpus is DISMISSED without prejudice to refiling after exhausting the BOP's administrative appeals process.

Respondent has filed two motions to relate this case to several other actions in this court which also challenge the regulation challenged herein.⁴ The facts and circumstances of each individual petitioner's sentence, conviction, release date, and history of administrative exhaustion vary greatly. As a result, and in light of the dismissal of the present action, the motions to relate the cases are DENIED.

The clerk shall close the file and terminate Docket Nos. 9 & 15.

IT IS SO ORDERED.

DATED: 9/14/07

Martin J. Jenkins
MARTIN J. JENKINS
United States District Judge

⁴The Court notes that numerous cases have been filed in this court challenging the same regulation, including cases not mentioned in respondent's motion.